

**RULING RE: WRITTEN CROSS-EXAMINATION QUESTIONS OF KARL ENGLISH POSED BY REPRESENTATIVE OF B.C. FISHERIES SURVIVAL COALITION AND SOUTHERN AREA E GILLNETTERS ASSOCIATION**

1. On April 20, 2011, Philip Eidsvik (“Eidsvik”), the lay representative of the participant group, the British Columbia Fisheries Survival Coalition and Southern Area E Gillnetters Association (together “BCFSC” for the purposes of this ruling), provided to the commission a 9-page letter containing approximately 42 questions (some have sub-questions) to put to Karl English (“English”), one of the authors of the commission’s technical report #7, *Fraser River Sockeye Fisheries and Fisheries Management and Comparison with Bristol Bay Sockeye Fisheries* (“Report #7”).
  
2. On April 21, 2011, counsel for the participant group, the Sto:lo First Nation and the Cheam Indian Band (the “STC-CIB”), wrote to commission counsel objecting to the questions contained in Eidsvik’s letter. Counsel for the STC-CIB submitted that Eidsvik’s questions should be “rejected in their entirety” and asked that I determine this issue. In his letter, counsel for the STC-CIB also submitted that it is no longer appropriate for Eidsvik to appear on behalf of the BCFSC at the commission hearings as this participant group has retained legal counsel.
  
3. In addition to the submissions of counsel for the STC-CIB, counsel for the First Nations Coalition (“FNC”) and for the Tsawwassen First Nation (“TFN”) provided written submissions on April 28, 2011 supporting the submissions of counsel for the STC-CIB. On April 29, 2011, counsel for the Government of Canada (“Canada”) provided its submissions, as did commission counsel. On May 3, 2011, the junior counsel representing BCFSC provided response submissions and on May 4, 2011, counsel for the STC-CIB provided his reply submissions.

*Background to the objection:*

4. The commission's hearings of April 15, 2011 were dedicated to the examination and cross-examination of English. On April 15, commission counsel had allotted 45 minutes to Eidsvik to cross-examine English.

5. Eidsvik had conducted approximately 35 minutes of his cross-examination of English when the hearings concluded for the day. At the time, Eidsvik stated that he wished to complete his cross-examination in writing. Also at that time, counsel for the STC-CIB advised me that he may object to some of Eidsvik's questions. Counsel for the STC-CIB sought and received the assurance of commission counsel that she would circulate Eidsvik's questions to all participants, and a timetable was set to receive and circulate Eidsvik's questions and for participants to make objections.

*Summary of submissions:*

6. In his letter, counsel for the STC-CIB set out three grounds upon which his objection to all of Eidsvik's questions was based:

- a) Written questions should "only be allowed where they are short and directed at a particular matter that was raised but not fully addressed in the hearings." Eidsvik's questions should not be allowed where they "amount to a wide-ranging continuation of a cross-examination on new topics";
- b) Eidsvik's questions raise issues that, depending on English's answers, are likely to give rise to further cross-examination and re-examination by other participants. With written questions, further cross-examination and re-examination is precluded; and
- c) A number of the questions are improper: they are argumentative or are based on facts that have not been established.

7. In their submissions, the FNC and the TFN support the submissions of counsel for the STC-CIB. In both their submissions, the FNC and the TFN note my ruling of September 15, 2010 concerning paragraph a.i.A. of the commission's Terms of Reference, which directs me "to conduct this inquiry without seeking to find fault on the part of any individual, community or organization ...". These participants submit that Eidsvik's questions run counter to this paragraph and to my ruling as the questions are focused on finding fault.

8. Counsel for the FNC further objected to one of Eidsvik's questions in particular as being vague and unclear and presuming facts not established in evidence.

9. Counsel for Canada also opposed the written questions posed by Eidsvik. Canada stated that it is opposed to "written questions being utilized as a proxy for oral examination" except where it has been approved by me beforehand.

10. Echoing the submission of counsel for the STC-CIB, Canada reiterated, at paragraph 6 of its submissions, that the procedure of providing further written questions after all participants have completed their oral examination is "particularly unfair" because there is no opportunity for re-examination, and it "favours the one party providing the further written questions after hearing the questions and answers from all other participants."

11. Canada suggested that where a participant does not have sufficient time to ask all questions orally, the participant should bring a motion before or during that particular hearing, illustrating the relevance and importance of their questions so that a determination can be made that is fair to all participants.

12. Commission counsel disagreed that I should reject all of Eidsvik's questions; she submitted that each of Eidsvik's questions should be examined to determine its appropriateness. Commission counsel also submitted that if re-

examination arises from any of the answers provided by English to Eidsvik, the re-examination should be in writing and that the possibility of re-examination is not a proper basis for disallowing all of the questions posed.

13. Commission counsel takes issue with 26 of Eidsvik's questions and sub-questions, setting out in her submissions the basis for the objection:

- Question 1(b): Mr. English has not testified with respect to issues of conflict of interest. His report addresses the accuracy, precision and reliability of catch estimates. An analysis of conflict of interest between aboriginal organizations and the members of such organizations is outside the scope of Mr. English's work and expertise.
- Question 4(d): This question is objected to as vague. It does not identify on whose behalf research had or had not been conducted. Without the identity of the requester of such research, the witness cannot fairly be asked to respond to why such research was not undertaken.
- Question 5(a): The question improperly contains assumptions which have not been proven, namely "given the possible negative impacts of blockages or altered migration paths due to the presence of hundreds of setnets:...".
- Question 5(c): This question improperly requires the witness to speculate as to why DFO did or did not commission studies.
- Question 5(e): This question assumes facts which have not been established with the witness, namely "the physiological effects on fish of blockages and altered migration paths", and as such is an improper question.
- Question 7(a): The extent of trade or barter of caught fish permitted by aboriginal organizations is irrelevant to the evidence given by the witness, namely evidence on the accuracy, precision and reliability of catch estimates, except to the extent described in question 7(b).
- Question 8: This question assumes facts which have not been established with the witness, namely the presence and

extent of multiple fisheries in the Lower Fraser pre and post 1992, and includes questions on matters not the subject of Project 7 – namely the number of nets and the number of days of net fishing over an unspecified period of time. For these reasons all of question 8 is objectionable.

- Question 9: This question is objectionable as it is unclear as to what is meant by a “single commercial fishery”, a “separation between aboriginal FSC fisheries and commercial fisheries”, and “effective and easier” implementation. Further, this question appears to go beyond the scope of Project 7.
- Question 10: This question is objected to on the same basis as questions 8 and 9.
- Question 11: This question is objected to on the basis that what is meant by “peaceful passage” is not clear.
- Questions 14 & 15: These questions are objected to as improper. These questions appear to challenge the qualification of Mr. English and Mr. Bocking in the preparation of Project 7 as tendered. The witness and Project 7 have been tendered and accepted in this Inquiry. If Mr. Eidsvik had an objection to the qualification of Mr. English or Mr. Bocking, such objection ought to have been raised at the time Mr. English was qualified and Project 7 was tendered.
- Question 18: This question is objected to as argumentative.
- Question 19: This question is objected to as it requires the witness to speculate as to decision making within DFO.
- Questions 20 & 21: These questions are objected to as being beyond the scope of Project 7, which did not address allocations of harvest between sectors, gear types or individual fishers.
- Question 23: This question has not been completed and as such is objected to.
- Questions 26-28: These questions are objected to as being beyond the scope of Project 7, which did not address the cost of monitoring to individual fishers.
- Question 29: This question is objected to as:
1. unclear in the reference to “these problems”,

2. requiring speculation on reactions possible by Area E gillnetters to the undefined problems, and
3. requesting an opinion on reactions and motivations of persons, which is an area in which Mr. English has not been qualified as an expert.

Questions 31-33: These questions are objected to on the same basis as questions 20 and 21.

Question 38: This question is objected to as already asked and answered in earlier testimony.

Question 40: This question is objected to as irrelevant.

*Response of counsel for BCFSC:*

14. On May 3, 2011, junior legal counsel to the BCFSC responded to the submissions of counsel for the STC-CIB in order, saying:

- a) Lengthy cross-examination here is justified because, in the opinion of the BCFSC, Report #7 “is deeply flawed”, the issues are important, and counsel have previously put comparable numbers of written cross-examination questions to a witness;
- b) The order of cross-examination will inevitably work to the disadvantage of some participants regardless of whether the questions are written; and
- c) With reference to specific questions and generally, written argumentative questions are not unfair because the witness “has time to carefully consider his answer”, and can disagree with presumptions in questions he does not accept.

15. On the last point, she addressed in some detail the shortcomings her clients see in Report #7 and the importance of the issues.

16. The BCFSC counsel also submitted that it is appropriate for Eidsvik to continue to appear as the primary representative of the BCFSC because of the commitments of his legal counsel, Kerry-Lynne D. Findlay, as a Member of Parliament, and because of Eidsvik's experience in the issues before this commission.

*Reply Submissions:*

17. Counsel for the STC-CIB replied on May 4, 2011, agreeing with commission counsel's specific objections, but reiterating his submission that all of Eidsvik's questions should be rejected. He submitted that much of BCFSC's counsel's response is more appropriately made in final argument on the weight to be given to Report #7. He also submitted that other participants have knowledgeable client representatives, that Eidsvik's "continued attendance sets an uneasy precedent", and that he should not receive "special dispensation".

*Ruling:*

18. In order to be able to complete the work of the commission, the time available to participants, and to commission counsel, to conduct examination and cross-examination of witnesses during the hearings is very limited. More often than not, the time originally allocated or estimated must be reduced to accommodate questions from all of the participants who have expressed an interest in examining a witness.

19. From the commencement of the hearings the participants have been asked for and given their cooperation to commission counsel on time allocations and estimates in the interests of conducting the hearing process in the most fair and reasonable manner possible.

20. On occasion, where a participant has not completed his or her examination or cross-examination within the time allocated or estimated, circumstances have dictated that a participant be granted leave to ask questions of a witness in writing.

This option has been used sparingly for a variety of reasons, not the least of which is the burden it places on a witness after the hearing. In any event, a decision about whether or not a participant should be permitted to ask questions of a witness in writing and the number and appropriateness of the questions must be made in the context and circumstances in which they are posed.

21. In the instant case, I do not agree with the position of counsel for the STC-CIB that Eidsvik's questions should be completely rejected. I have reviewed Eidsvik's questions, and the submissions of counsel in relation to his questions and in the result, do not allow questions 1(b), 4(d), 5(a), 5(c), 5(e), 7(a), 8, 9, 10, 11, 14, 15, 18, 19, 20, 21, 23, 26, 27, 28, 29, 31, 32, 33, 38, and 40 for the reasons expressed in commission counsel's submission.

22. In addition, I disallow question 37 as it asks English to speculate on the reasons for DFO decisions, and in my opinion, is unlikely to elicit evidence of significance to the considerations, findings of fact, or recommendations I am charged with making by the commission's Terms of Reference.

23. Finally, I have considered the submission of counsel for the STC-CIB that Eidsvik no longer be permitted to appear on behalf of the BCFSC. In my consideration of this issue, I have been unable to find any authority setting out a rule, applicable to this Inquiry or analogous circumstances, that "represented parties appear only through counsel" (Submission of STC-CIB).

24. The commission's Rules of Procedure and Practice ("Rules") do not specifically address the issue of who is authorized to appear before the Commissioner. Rather, I am granted discretion to: (a) control of the procedure to be followed at the hearings, and (b) determine on what terms a participant may participate and the nature and extent of such participation. There is nothing in the Rules that would prevent me from permitting a non-lawyer to appear on behalf of a participant, whether or not that participant is represented by counsel.

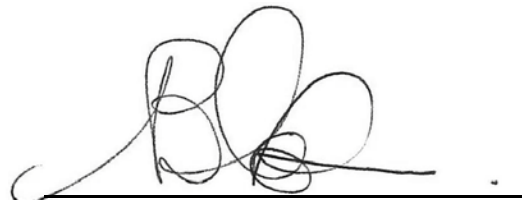


25. This is not a court proceeding, but it is to some extent analogous. In *R. v. Dick*, (2002 BCCA 27), the court confirmed that the court may confer a “privilege” of audience on a person who is not a lawyer. This discretionary power arises by virtue of the court’s inherent authority to control its own process.

26. Courts are guided by policy considerations in considering whether to exercise this discretion. As the Court noted in *R. v. Dick*, at para 7, “Each court has the responsibility to ensure that persons appearing before it are properly represented and (in the case of criminal law) defended, and to maintain the rule of law and the integrity of the court generally.” There, the court refused to grant a privilege of audience to an agent to represent an individual where the agent had engaged in abusive, vexatious and disrespectful conduct in previous court proceedings.

27. Counsel for the STC-CIB has not alleged, nor do I consider that Eidsvik has engaged in abusive, vexatious or disrespectful conduct in this Inquiry. I am not persuaded there is any mischief in Eidsvik continuing to represent the BCFSC at some of the hearings, and for BCFSC counsel to appear at others. Should this arrangement raise issues for the other participants in the future then they may raise those issues for my consideration.

Dated: May 27<sup>th</sup>, 2011



The Honourable Bruce I. Cohen  
Commissioner